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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 35063

MICHIGAN CENTRAL RY, LLC-
ACQUISITION AND OPERATION EXEMPTION-
LINES OF NORFOLK SOUTHERN RY CO

COMMENTS OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT AND BROTHERHOOD OF RAILROAD SIGNALMEN

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The Brotherhood of Maintenance of Way Employes Division/IBT ("BMWED") and Brotherhood of Railroad Signalmen ("BRS"), the unions that represent maintenance of way employees and signalmen employed on the rail lines that are the subject of this Finance Docket, submit these comments in opposition to the petition for exemption filed by Michigan Central Railway LLC for Michigan Central's proposed acquisition of certain rail lines, structures, facilities and equipment owned and operated by Norfolk Southern Ry ("NSR") BMWED and BRS submit that the Board should deny the petition because there is no actual, cognizable acquisition transaction for the Board to consider

Although the Michigan Central transaction has been characterized as involving a routine new short line company acquisition of a Class I carrier's rail lines with a related arrangement for a parent holding company (Watco Cos Inc) to continue to control the new short line, it is anything but that sort of transaction In this case the selling carrier, NSR, will have a substantial ownership interest in the acquiring entity In fact NSR will have effective control of Michigan Central Indeed there is no real acquisition transaction at all here NSR would effectively transfer the right of way, lines, structures, facilities and equipment to an entity it would control And the related trackage rights arrangement is not a simple trackage rights transaction, rather, it is a

contingent trackage rights transaction which is exercised at the decision of NSR when there is a recurring service failure, and then NSR will come in not to just travel over the tracks, but to serve two very major shippers This is merely an arrangement whereby NSR is transferring assets it owns to an entity that it effectively controls This is not an actual acquisition transaction under the Interstate Commerce Act, since there is no bona fide transaction, the Board should deny the petition for exemption from approval under Section 10901

BACKGROUND

On Friday July 13, 2007, Michigan Central, Watco, and NSR filed various petitions and notices in this Finance Docket and related Finance Dockets Among other things, Michigan Central petitioned for revocation of the class exemption for non-carrier acquisitions, and then petitioned for an exemption of the so-called plan for Michigan Central to "acquire" certain NSR assets in Michigan from prior approval under Section 10901

Michigan Central has been described as a newly formed company, to be owned by Watco and NSR to acquire 299 miles of right of way and track, 80 miles of trackage rights, certain incidental trackage rights, and related yards, structures, facilities and equipment Petition To Revoke Exemption at 4-5, Petition for Exemption at 10-11 According to the Transaction Agreement, Watco will contribute $18 million in cash and locomotives ($9 4 million in cash, $8 6 million in locomotives), and NSR will contribute the right of way, lines, structures, facilities, equipment and trackage rights Petition To Revoke Exemption at 4-5 Michigan Central and NSR have not disclosed the value they attached to the rights of way, lines, structures, yards, facilities, equipment and trackage rights contributed by NSR Nor has NSR disclosed the value that it placed on those assets for purposes of a sale In response to a discovery request served by

BMWED and BRS, NSR provided recent estimates of "book value" and "net book value" of the rights of way, lines, facilities, equipment and trackage rights NSR Response to BMWED/BRS interrogatories (BMWED/BRS Ex 1)at 8-9, response to interrogatory no 10 But as the unions are sure the Board well knows, book value is not reflective of actual sale value of railroads and rail lines, book value is generally many times higher than sale value BMWED and BRS served a follow-up set of interrogatories specifically focused on an actual value or sale value of the lines, as well as the value assumed for purposes of the proposed transaction (BMWED/BRS Ex 2) But the NSR response was a general denial of the relevance of that information and a rather circular assertion that actual value was the value negotiated by NSR and Watco *Id* at 3, 4, response to interrogatories nos 12 and 14 Interestingly, NSR responded that "in the context of this proceeding" the value of the assets to be conveyed "is reflected in the terms of the transaction as described by the Petition for Exemption and in the Transaction Agreement and related agreements " *Id* at 3 Perhaps "in some other context", or for its own purposes, NSR would attach a different value to these assets But, at this point, no one knows the objective value of the assets contributed by NSR, and NSR isn't telling

Based on this description of the relative ownership interests, Michigan Central, NSR and Watco represent that Watco will have a 67% interest in Michigan Central and NSR will have a 33% interest, and there will be a management committee of 5 persons, two designated by NSR and three by Watco Petition To Revoke Exemption at 4-5 The petitioners say that this means that Watco will control Michigan Central and NSR will not have a controlling interest Petition for Exemption at 12-13

However, NSR will have veto power over all "major decisions" such as a sale, lease,

acquisition or divestiture of any assets of the company, investment in another enterprise, approval of the annual budget, operating plan and business plan, expenditures of more than 110% of budget amounts, incurring of debt of more then $1 million, material modifications of employee benefit plans, initiating or settling litigation, or regulatory proceedings, where the amount at issue exceeds $1 million, and creation or change of interchange points and arrangements for haulage or trackage rights In all of those situations, and others, at least one NSR member must vote to approve the action Michigan Central LLC Agreement at 9-10 So although Watco has a majority on the management committee of Michigan Central, NSR has a veto on major decisions Furthermore, petitioners have acknowledged that NSR will not share in the "economic benefits of the operation of Michigan Central at the purported ownership ratio of 2/3 Watco-1/3 NSR Petition for Exemption at 11 n 2 In fact, NSR will share in the economic benefits, including net cash flow, at essentially a reverse ratio of the described ownership interests According to the Michigan Central LLC Agreement, the economic benefits will be divided 2/3 for NSR and 1/3 for Watco for the first $7 million in earnings before interest, taxes, depreciation and amortization, the split will be 3/5 NSR and 2/5 Watco for the next $3 million, and only once those earnings exceed $10 million do the owners share equally Michigan Central LLC Agreement at 6, 12, 23-24

With respect to operations, it is asserted that there will be little increase in traffic According to the Petition for Exemption (at 16), for the eight line segments, the largest increase will be 1 5 trains, freight traffic will increase only from 26 1 to 26 3 trains per day, and total gross ton miles measured by million gross ton miles will increase by "a modest 0 1 million gross ton miles" *Id* at 17 Petitioners project annual rail revenues for Michigan Central to exceed $25

million *Id* at 21

NSR can exercise control over track maintenance and improvements on Michigan Central Michigan Central is required to maintain the line to "reasonably good condition". NSR may send a "geometry car" over the tracks by right twice a year to inspect the condition of the tracks NSR may request facility changes and "betterments", if Michigan Central does not want to make the improvements because the expense exceeds the value to Michigan Central, it will be required to do so anyway, but cost in excess of the benefit to Michigan Central will be borne by NSR Joint Use Agreement at 8, 17

The Transaction Agreement requires Michigan Central to interchange only with NSR, even non-rail interchange is barred Michigan Central is expressly prohibited from interchanging traffic with anyone other than NSR, this includes both interchange with steel wheel or rubber wheel movements Breach of this restriction is subject to heavy liquidated damages (a penalty provision) Transaction Agreement at 13

The NSR trackage rights transaction is portrayed as a routine trackage rights transaction, but it is not an arrangement for NSR to generally operate across the transferred lines or to operate to specific locations Rather, NSR has retained the ability to serve two major shippers on the lines, General Motors and Holt RSDC, if service by Michigan Central is deemed continually inadequate This is a contingent trackage rights transaction which is exercised when there is a Service Standards Failure, and then NSR will come in not to just travel over the tracks, but will actually serve these two major shippers, and it will use its own crews and equipment to do so Joint Use Agreement at 4, Trackage Rights Exemption at 3-5 A Service Standards Failure is declared if Michigan Central has significant recurring service problems as defined by the Joint

Use Agreement (with dispute resolution by expedited arbitration), then NSR may exercise contingent trackage rights and directly serve the GM and Holt RSDC facilities Joint Use Agreement at 9-10

Petitioners have asserted that they are doing this transaction to allow capital contributions by NSR and Watco in a way that will not leave Michigan Central with high acquisition debt-- to provide Michigan Central with independent access to capital and the ability to invest where it is most needed, and to have local management Petition to Revoke Exemption at 5, Petition for Exemption at 13 But they have not explained why this would allow or encourage more or better-targeted investment than if NSR still directly owned and was still responsible for the lines Furthermore, the main line right of way, structures, facilities and equipment that NSR proposes to sell to Michigan Central are in good condition without need of major renovation, renewal, rehabilitation or other capital work, track inspection reports produced by NSR show that the track is safe and without defect for the applicable time table speeds, that the main line bridges are in good state of repair, and that some branch line bridges will need renewal and rehabilitation in the future Declaration of Bradley Winter (BMWED/BRS Ex 3) ¶¶5 and 6

As a result of this transaction NSR will no longer be responsible for operating and and maintaining the subject assets, it would pass that duty on to Michigan Central Joint Use Agreement at 8 But NSR will still keep all the traffic that comes off the lines because Michigan Central will be heavily penalized if it interchanges with anyone other than NSR Furthermore, representatives of Michigan Central have advised union officers that it insists on operating under short line rates of pay, rules and working conditions which are substantially less beneficial to employees than those under the NSR agreements Indeed, Michigan Central representatives have

said that they intend pay cuts of about $2 00-$4 00 per hour for maintenance of way workers, and about $4 00 per hour for Signalmen Michigan Central would also have a less beneficial health insurance plan than the national health plan, and no income protection arrangements comparable to those on NSR Other work rules would be more advantageous to the railroad and less advantageous to employees than those on NSR Additionally, Michigan Central is insisting on a single agreement for all employees with consolidated terms covering all workers Winter Declaration ¶¶3-4 Michigan Central states that it plans to employ fewer railroad workers than are employed by NSR on these assets, according to the Petition for Exemption (at 9) employment will be reduced from from 138 to 118 (16%), but BMWED has been advised that maintenance of way positions will be reduced by from 45 to 24 (47%) Winter Declaration ¶4 *See also* Declaration of BRS general Chairman Eldon Lutrell (BRS/BMWED Exhibit 4) ¶¶3-4

ARGUMENT

I. THE BOARD IS REQUIRED TO REJECT PETITIONS AND APPLICATIONS WHERE THE TRANSACTIONS ARE SHAMS OR HAVE NO BONA FIDE TRANSPORTATION PURPOSE

A well-established line of judicial and ICC/STB precedent holds that the Board can, and should, reject a proposed transaction that is a sham, that is a paper transaction or that otherwise seeks Board sanction for a purpose other than for the transportation purposes that have been described to the Board

In *County of Marin v United States*, 356 U S 412 (1958), the Supreme Court vacated ICC approval of a transfer of operating authority from a motor carrier to its subsidiary in return for stock in the subsidiary The effect of the transaction, indeed its apparent purpose, was to defeat State agency jurisdiction *Id* at 415 The Supreme Court held that the Commission should

have rejected the transaction presented The Court said that the proposed transaction "contemplates an acquisition by one carrier, of another carrier, Golden Gate, a mere corporate shell without property or function", additionally, the Court said that "[e]ven if we look beyond Golden Gate's present status" , the planned transfer was little more than a "paper transaction" between the two commonly-owned corporations for the purpose of avoiding State regulation and was not an acquisition under the Act *Id* at 418 -419 In *Gilbertville Trucking Co v United States* , 371 U S 115 (1962), the Court affirmed an ICC order rejecting a proposed merger of two carriers because they had already been the subject of unauthorized de facto common control *Id* at 120 - 125 And *Northern Alabama Express, Inc v ICC*, 971 F 2d 661 (11th Cir 1992), the Eleventh Circuit reversed an ICC decision approving a transfer of operating rights because there was no real transaction where the party supposedly acquiring rights from another carrier already had such rights, and it appeared that the purpose of the arrangement was to avoid State regulation *Id* at 664-665 *Cf Burlington Northern Railroad Company v United Transportation Union et al* , 862 F 2d 1266 (7th Cir 1988), where the Seventh Circuit enjoined changes in working conditions under a purported trackage rights transaction between a parent corporation and defunct subsidiary and rejected arguments that the changes were permissible under an ICC trackage rights arrangement The court found that there was not a legitimate trackage rights arrangement, and the arrangement was merely a device to evade a collective bargaining agreement *Id* at 1279-1281

The ICC and STB have also rejected or modified transactions when they were found to be "shams" or were planned not for legitimate transportation purposes, but for other reasons In *Fast Interstate Express, Inc* , 127 M C C 279, 282 (1976), an acquisition of a truck line by an

employee of a carrier was held to involve acquisition of control of the truck line by the employer due to the realities of employer-employee relationship *Sagamore National Corporation Acquisition and Operation Exemption - - Lines of Indiana Hi-Rail Corporation*, F D No 32582 (served September 20, 1994, and October 28, 1994), involved a purported acquisition of a rail line, but the ICC held that no "transaction cognizable under the Interstate Commerce Act actually took place" because of a substantial interrelationship between the two parties And in *Hi-Tech Trans, LLC –Petition for Declaratory Order–Newark, NJ*, F D No 34192(Sub-No 1)(served November 20, 2003 and August 14, 2003), the Board rejected a company's petition for a declaratory order that its operation of a truck-to-rail transloading facility was subject to STB jurisdiction, concluding that Hi-Tech was not a rail carrier, and that the purpose of the petition appeared to be to seek preemption of State and Local regulation of the facility The Board also noted (*id* n 12) that if Hi-Tech followed formal Board procedures to become a rail carrier, "the Board will not approve rail carrier authority that is a sham or intended solely to avoid local regulations" *See also SP&L Rv , Inc Acquisition and Operation Exemption– Toledo Peoria and Western Rv Corp*, F D 33996 and AB 448 (served October 17, 2002 and January 31, 2003), where the Board revoked an acquisition based on a determination that the acquiring entity actually intended to abandon and salvage the line In its decision, the Board cited decisions holding that the Board has authority to act to protect the integrity of its processes and that the Board may "revoke sham transactions", *e g Railroad Ventures v STB*, 299 F 3d 523, 563-64(6th Cir 2002), *Land Conservancy- Acq And Oper –Burlington Northern*, 2 STB 673 (1997), *Track Tec, Inc –Abandonment-in Adair and Union Counties, IA*, AB-493 (Sub -No 7x)(served November 1, 1999) and *Minnesota Comm Rv , Inc Trackage Exempt–Burlington*

Northern R R Co., 8 ICC 2d 31 (1991) *And see Portland & Western R R - Trackage Rights Exemption– Burlington Northern R R Co*., (F D No 32766)(Served March 11, 1997), evidence that a lease was not bona fide would be considered to support a petition for revocation of an exemption, and *InterCarolinas Motor Bus*., 28 MCC 665, 669 (1941), - - "We are not bound by the name which the parties applied to the arrangement which they entered into"

In *Delaware and Hudson Ry Co —Springfield Terminal Ry*., 4 ICC 2d 322(1988), the ICC concluded that a series of purported individual intra-corporate lease transactions were more akin to a merger or control transaction, that the series of transactions had been mis-characterized as leases and the goal was actually to apply on all commonly owned carriers advantageous work rules applicable on the smallest affiliate in order to reduce labor costs, and that in implementing the leases the affiliate with the extended operation has misinformed and misled employees about their rights 4 ICC 2d at 327-330 However, because the leases had already been implemented, the ICC did not revoke the exemptions from regulation that it had granted and instead imposed the sort of employee protections that would be applied in a merger or control transaction *Id* at 325, 334 *See also Burlington Northern v UTU, supra* where the Seventh Circuit refused to issue a strike injunction based on the ICC's action on a "lease" because there was no real lease transaction, merely an attempt to use an ICC authorization to achieve lower labor costs

Thus, the Board can, and should, consider evidence that a transaction is illegitimate and must reject sham and paper transactions and transactions that invoke Board jurisdiction for purposes other than the purported transportation purposes presented to the Board

II. THE MICHIGAN CENTRAL TRANSACTION IS A SHAM, NOT A LEGITIMATE SALE/ACQUISITION, BECAUSE THERE IS NO ACTUAL TRANSFER OF CONTROL OF THE NSR'S ASSETS, NOR IS THERE A BONA FIDE TRANSPORTATION PURPOSE FOR THIS ARRANGEMENT

BMWED and BRS respectfully submit that the petition for exemption of the arrangement at issue in this Finance Docket from the requirement for STB approval under Section 10901 should be rejected because there is no real sale, no transfer of control of NSR's assets Instead NSR is effectively shifting rights of way, lines, structures, facilities and equipment from itself to an entity that it effectively controls This is certainly a sham or paper transaction Moreover, there is no legitimate transportation purpose to this arrangement, all that will be accomplished will be that NSR will retain traffic coming off these lines, and will retain the ability to serve the largest shippers on the line in the event of service failure by Michigan Central, but labor costs for operations of these lines will be dramatically reduced Petitioners assert that the NSR will not maintain control because the agreements among the petitioners say that NSR will have only 33% ownership of Michigan Central, they further assert that there will be transportation benefits because Michigan Central will be able to invest in the lines and to do so where it is most needed However, petitioners have described the concept of control too narrowly, the facts do not support their assertion that NSR will not have control of Michigan Central, and the purported transportation benefits are simply specious

ICA Section 10102(3), originally in former Section 5, defines "control" as including "actual control, legal control and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust or a holding or investment company, or (B) any other means" In *United States v Marshall Transport*, 322 U S 31 (1944), the Supreme Court rejected a narrow reading of the term "control" and said that former Section 5(2) and former Section 5(4) "embraced every type of control in fact", and that "the existence of control must be determined by a regard for the actualities' of intercorporate relationships", and that it covered

control "however such result is attained, whether directly or indirectly, by use of common directors, officers or stockholders or in any manner whatsoever §5(4) Control or management is defined to include 'the power to exercise control or management §5(4)" *Id* at 38, ellipsis in original In *Allegheny Corp v Breswick*, 353 U S 151, 163 (1957), the Court said that the determination of control depends on "the realities of the situation" and that it had "rejected artificial tests for 'control' and left its determination in a particular case as a practica[l] concept to the agency charged with enforcement" And in *Gilbertville Trucking, supra*, the Court found a control relationship based on family and employer-employee relationships, the Court noted that "We have construed this language to encompass every type of control in fact and have left to the agency charged with enforcement the determination from the facts whether 'control' exits, subject to normal standards of review" 371 U S at 125

Given this broad definition of control, it cannot be said that NSR will relinquish control of the assets that it purports to convey to Michigan Central, or that NSR will not control Michigan Central The unions submit that this arrangement plainly is not the sort of Section 10901 non-carrier acquisition that the Commission and Board have regularly permitted, where there is no relationship between the buying entity and the selling entity The mere fact that NSR has such a large stake in the acquiring entity is inconsistent with the assertion that the arrangement is a Section 10901 non-carrier transaction But there is much more

Under the agreements between NSR and Wateo, no "major decision" may be undertaken by Michigan Central without approval of one of NSR's members of the management committee Michigan Central LLC Agreement at 27 These decisions include items such as sale, lease, acquisition or divestiture of any assets of the company, investment in another enterprise,

approval of the annual budget, operating plan and business plan, expenditures of more than 110% of budget amounts, incurring of debt of more than $1 million, material modifications of employee benefit plans, initiating or settling litigation, or regulatory proceedings, where the amount at issue exceeds $1 million, and creation or change of interchange points and arrangements for haulage or trackage rights In all of those situations, and others, at least one NSR member must vote to approve actions that are integral to actually having control of a railroad Michigan Central LLC Agreement at 9-10 Essentially NSR can veto the most basic decisions a railroad can make NSR may argue that its veto power over these major decisions does not demonstrate its control over Michigan Central, or the lack of a real sale, and that these restrictions are merely to protect its equity in the company But as is readily apparent, the categories of "major decisions" go way beyond disposition of the company's assets, incurring of debt and decisions on allocation of earnings, rather NSR will effectively control Michigan Central on a minute operational level -down to decisions to spend more than 110% of budget, to incur debt or start litigation or participate in regulatory proceedings where more than $1 million is involved, to change interchange points and to materially modify employee benefit plans The sort of decisions over which NSR will have a veto include day-to-day business decisions

The parties' agreements also require Michigan Central to interchange all traffic with NSR, even interchange with trucks is subject to substantial penalties, there can be no movement of traffic off the lines without NSR participation NSR will effectively control track maintenance and improvements Michigan Central must satisfy NSR that the lines remain in "reasonably good condition" , NSR may send a "geometry car" over the tracks twice a year to inspect the condition of the tracks, and NSR may request improvements, which Michigan Central must make (if it

feels the expense exceeds the value of the improvements to Michigan Central, it is nonetheless required to make the changes, but the cost in excess of the benefit to Michigan Central will be borne by NSR) Joint Use Agreement at 8, 17 Furthermore, if there are recurring service problems, NSR can directly serve the largest shippers on these lines BMWED and BRS submit that these restraints and mandates that NSR has imposed on Michigan Central constitute "control" of that entity Even if these restraints and mandates were not individually enough to show NSR's control of Michigan Central, in combination they demonstrate control, and when taken together with the NSR ownership interest, there certainly is control in fact- actual control based on the realities and practicalities of the situation within the meaning of the Act as described in *Marshall Transport, Allegheny* and *Gilbertville*

The petitioners have argued that NSR conclusively lacks control over Michigan Central because their agreements say that NSR will have only 33% a ownership interest But *Marshall Transport, Allegheny* and *Gilbertville* all teach that such corporate arrangements and structures are not determinative Substance, not form, is decisive, if a party can actually control another party, it does not matter that ownership status is below 50% In this case, when all of the various restraints and mandates imposed on Michigan Central are considered, NSR would remain in control of the assets involved, and there is no actual transfer

BMWED and BRS also submit that the ownership proportions described by the petitioners should not be credited It is asserted that Wateo will have a 67% ownership interest after it contributes $18 million in cash and locomotives, whereas NSR will have a 33% ownership interest But the petitioners have not disclosed the value they have attached to NSR's capital contributions And NSR has refused to provide that information to BMWED and BRS

despite multiple different discovery requests for the values assigned to NSR's contributions BMWED and BRS also note that for the 2/3-1/3 split described, the value of NSR's contribution would have to be about $9 million, and the total value of the assets about $27 million This plainly cannot be so NSR is supposedly conveying 299 miles of right of way and track, yards, structures, facilities and equipment that are in generally good condition, and 80 miles of trackage rights plus incidental trackage rights The lines to be conveyed have access to strong and reliable shippers and eight Amtrak trains per day run on the lines The lines are not abandonable and they apparently make some profit It simply cannot be that all of these items are worth a mere $9 million-justifying the attribution of a 1/3 interest to NSR And despite multiple requests for an explanation by BMWED and BRS, NSR has simply asserted that value attributed to these assets is what Michigan Central was willing to pay, NSR has refused to disclose its own pre-transaction valuation of the assets A substantial body of precedent holds that a party's refusal to provide information that might support its position when such information that is in that party's exclusive control, is basis for an adverse inference against that party-that the information would be adverse to it [1] BMWED and BRS submit that here it is reasonable to infer that an actual objective valuation of these assets would reveal that they are worth far more than $9 million, and that the actual control situation is not as described by the petitioners

A presumption that NSR's contribution to the acquisition is worth much more than $9 million is supported by reference to sale prices in other recent line sales In 2004, RailAmerica announced that it had acquired 100 miles of rail line in central Michigan that generated $11

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[1] *Norfolk and Western Ry Co v Transportation Communications Intern Union*, 17 F 3d 696, 701-702 (4th Cir 1994); *International Union (UAW) v N L R B*, 459 F 2d 1329, 1336-1338 (D C Cir 1972); *Callahan v Schultz*, 783 F 2d 1543, 1545 (11th Cir 1986).

million in revenue for $25 3 million (BMWED/BRS Ex 5a), but here Michigan Central would be acquiring three times as many miles of lines, plus 80 miles of trackage rights and incidental trackage rights also in central Michigan where much higher revenues are anticipated (projected at $25 million annually, Pet For Exempt at 21), yet the implied purchase price here would be almost the same as the much smaller RailAmerica acquisition in 2004 In 2003, Genesee & Wyoming announced (BMWED/BRS Ex 5b) that it had acquired three short lines totaling 124 miles of lines that produced $18 million in revenues for $55 6 million (twice the imputed value for Michigan Central if NSR's contribution is $9 million where the Michigan Central lines are nearly 3 times the trackage as those acquired by Genessee and Wyoming, and the Michigan Central is expected to produce more revenue) In 2002 Genesee & Wyoming announced (BMWED/BRS Ex 5c) that it had acquired the 45 mile Utah Railway and its 378 miles of trackage rights for $54 million BMWED and BRS submit that any assertion that the value of NSR's capital contribution was something like $9 million is simply not credible Of course there are likely to be significant differences between the lines to be conveyed to Michigan Central and the lines acquired by Genesee and Wyoming and RailAmerica, but the disparity in price is so great that differences among the lines cannot possibly account for even a substantial part of the difference in price

NSR may respond that it never asserted that the assets it contributed were worth only $9 million, but that is the implication of its assertion that it will own just a 1/3 interest in Michigan Central in comparison to Wateo's 2/3 interest Indeed, this 1/3-2/3 split of ownership is the predicate for the assertions that NSR will not control Michigan Central, and that there is a real acquisition transaction here But if, for example, if the actual value of the assets to be conveyed

was actually $50 million (merely 2 times the cost of RailAmerica's 100 mile Central Michigan transaction) or $80 million (1½ times the cost of Genesee & Wyoming's 2003 124 mile three short line acquisition) then the arguments of petitioners based on the ownership structure presented here would obviously be undercut BMWED and BRS submit that the blithe assertion by petitioners that NSR will not control Michigan Central because only a 1/3 interest in Michigan Central has been attributed to NSR simply cannot be accepted in the absence of evidence of the actual value of the assets contributed by NSR, and in the face of evidence that the value of the assets certainly exceeds $9 million

Another indication that actual control of Michigan Central would not be as described by the petitioners is their acknowledgment that the "economic benefits" of the operation of Michigan Central will not be shared at the ratio of 2/3 Wateo-1/3 NSR Petition for Exemption at 11 n 2 Rather the economic benefits will be shared at essentially a reverse ratio of the ownership interests such that the economic benefits will be divided 2/3 for NSR and 1/3 for Wateo for the first $7 million in earnings before interest, taxes, depreciation and amortization, the split will be 3/5 NSR and 2/5 Wateo for the next $3 million, and only once those earnings exceed $10 million do the owners share equally Michigan Central LLC Agreement at 6, 12, 23-24 This distribution of economic benefits is plainly inconsistent with the ownership interests petitioners have described, indeed NSR's willingness to be called a 1/3 owner may be explained by the fact that it will take 2/3 of the first $7 million earnings and 3/5 of the next $3 million in earnings

Petitioners may answer that none of this matters because NSR and Wateo have structured their arrangement so NSR is only a 1/3 owner of Michigan Central But as the control cases

discussed above make clear, control is determined not by corporate forms or presentation, but by practical ability to control If the arrangements described by petitioners are not consistent with the capital contributions of the parties, and with the distribution of economic benefits, then the foundation for petitioners' assertions of lack of control fail BMWED and BRS submit that when these inconsistencies are added to the level of control exercised by NSR through other means (veto power over major decisions, prohibition against other interchange, service failure intervention, ability to dictate maintenance work), it is clear that NSR would control Michigan Central and that there is no sale to a third party, rather NSR is selling its lines to itself -a sham and not a cognizable transaction Given the evidence of record, the Board cannot simply exempt this arrangement from the prior approval requirements of Section 10901

In their Petition for Exemption, the petitioners assert that NSR's control position with respect to Michigan Central is similar to its control position with respect to Meridian Speedway LLC, where "NSR's minority interest in the venture was not deemed to constitute control under Section 11323" Petition for Exemption at 12-13, *citing Norfolk Southern Ry -Trackage Rights Exemption-Meridian Speedway LLC*, Finance Docket No 34821 (served April 6, 2006) However, review of the April 6 notice in *Meridian Speedway* reveals that it was not a Board decision or a Board action on a notice of exemption, it was a notice of exemption issued by the Board's Director of Office of Proceedings The control relationship in *Meridian Speedway* was not made an issue by anyone, the facts concerning ownership and other indicia of control were not revealed and there certainly was no evidence of the sort of multiple restrictions and mandates that NSR has placed on Michigan Central *Meridian Speedway* provides no support whatsoever for the assertions that NSR will not control Michigan Central or that there is a real transaction in

the instant case Petitioners have also cited *Paducah & Louisville Ry, Inc – Acquisition–CSX Transportation, Inc* , Finance Docket No 34738 (served August 29, 2005) as supporting their position regarding the question of whether NSR will control Michigan Central Petition for Exemption at 13 n 4 But *Paducah & Louisville* provides no support for their position While *Paducah & Louisville* was issued by the Board itself, it was not actually a Board decision on any issue in that matter, it was merely notice of acceptance of an application which described the transaction and set a procedural schedule The notice did recite the applicants' description of the ownership interests of the interested parties and did note their contention that CSXT's 35% interest did not place it in a position of control, but the Board did not actually endorse the applicants' position and did not decide that issue 2005 WL 2071222 at *6 The actual decision in that matter (served November 18, 2005) did not indicate that the control issue was disputed by any party, or that it was decided by the Board Thus, the two decisions relied on by the petitioners here provide absolutely no support for their position

Another indication that the proposed transaction is not actually as it has been described is that the explanations and justifications for the transaction make no sense Petitioners have stated that the transaction "will serve several important goals The structure of the proposed transaction will permit NSR and Watco to make substantial capital contributions to Michigan Central (consisting of NSR's contribution of the rail lines and related assets and Watco's contribution of $18 million in working capital and locomotives) while allowing Michigan Central to avoid incurring a heavy acquisition debt load and financing costs" Petition for Exemption at 13 They also assert that "Michigan Central's independent access to working capital will permit it to invest in the most needed and most productive capital projects" *Id* And they assert that Michigan

Central's independent local management will be able to provide responsive service to local shippers and develop a new traffic base while maintaining and expanding the current traffic base " *Id* But there is no explanation behind these assertions

Surely NSR would have better and more advantageous access to capital than this new company, certainly the new company would not have better access to capital than NSR Nor is it explained why the interposition of Michigan Central would allow or encourage more or better-targeted investment than if NSR still directly owned and still was still responsible for maintaining the lines Why would Michigan Central be more knowledgeable than NSR about where capital investments are needed? And if Michigan Central was truly in a better position to maintain the lines, why has NSR reserved the right to unilaterally send its own geometry cars on the tracks twice a year? And why has NSR reserved the right to require Michigan Central to make "betterments" to the track that it wants with the costs above the value to Michigan Central borne by NSR? In response to BRS/BMWED interrogatories, Michigan Central stated that it "does not 'contend that it will be more or less better situated than NSR to make capital contributions to the lines to be conveyed to Michigan Central' nor does it contend that it will be better situated than NSR to know where capital investments are needed on the lines to be conveyed to Michigan Central '" Michigan Central response to BRS/BMWED interrogatory no 3 BMWED/BRS Ex 6 at 3 But that statement is inconsistent with a central component of the claims made about this arrangement–that there is some benefit to be obtained by Michigan Central's ownership of the lines as a result of the capital contributions, minimal acquisition debt, the structure of the relationship among the parties and the consequent ability of Michigan Central to "invest in the most needed and most productive capital projects" Petition for Exemption at 13

Indeed the response to the BMWED/BRS interrogatory is directly at odds with Michigan Central's representations about asserted goals of the alleged transaction and the supposed public benefits and transportation purposes of the alleged transaction Petition for Exemption at 13, 23-24, Petition to Revoke at 5

With respect to the assertions that Michigan Central's management will be able to provide responsive service to local shippers and develop a new traffic base while maintaining and expanding the current traffic base (Petition for Exemption at 13), BRS and BMWED note that the actual projections for traffic on the lines indicate a very slight net increase in traffic Petition for Exemption at 16-17 If the petitioners do not project any real increase in traffic over five years, what is the basis for saying that the new management will develop more traffic? And as for service, NSR often touts itself as the most efficient of railroads, and the lines in question are not inactive or sparsely used lines, but are active lines with major shippers Indeed, if the prospects are for improved and more responsive service, why have the parties included in their agreement the highly unusual provisions for service standards, determination of service failure and NSR resumption of direct service to the largest shippers in the event of recurring service failures? It should also be noted that for over twenty-five years, the major carriers and the ICC and STB have touted the benefits of single-line service and reduction of interchange, but now the Board is being told that adding interchange with a new carrier, even over a main line, will improve service

BRS and BMWED submit that all of these purported justifications for the transaction are simply specious and should not be credited BMWED and BRS further submit that the complete lack of force for the proffered justifications for the Michigan Central arrangement provides

additional support for their assertion that there is no cognizable transaction before the Board and *there is no real transportation purpose for this arrangement*

If there is no real transaction, and the arrangement serves no bona fide transportation purpose, then why are NSR and Watco creating Michigan Central? Of course, BMWED and BRS do not have to supply actual reasons for this arrangement for the Board to deny the exemption on the basis that it not actually what has been presented to the Board But it is apparent that by entering this arrangement, NSR can reduce its labor costs once these lines are removed from its system, while NSR obtains the benefit of continued control of the lines and the traffic they produce The arrangement entered by NSR and Watco relieves NSR of responsibility for operating and maintaining these lines and related properties and systems while NSR can keep all the traffic that comes off the lines because Michigan Central cannot interchange with anyone other than NSR And, as BMWED and BRS have shown, representatives of Michigan Central have insisted on operating under short line rates of pay rules and working conditions which are substantially less beneficial to employees than those under the NSR agreements wages would be lower, health insurance would be less costly, there would be no income protection arrangements, and other work rules would be more advantageous to the railroad than those on NSR Additionally, Michigan Central will employ fewer railroad workers than are employed by NSR Perhaps there are other unstated reasons for this arrangement, but the facts do not support the explanations proffered by the petitioners

But regardless of what the real reasons are for this transaction, and even if the justifications offered made sense, the Board is still faced with a petition for exemption for an arrangement that is not a real acquisition transaction, but one where NSR would be conveying its

assets to an entity that it effectively controls In such circumstances, there is no transaction and there is no basis for Board authorization of the arrangement presented to it *County of Marin, supra ,Northern Alabama Express, supra, Fast Interstate Express, supra , Sagamore National Corporation* Because there is no actual, cognizable acquisition transaction for the Board to consider the petition for exemption should be denied

CONCLUSION

For all of the foregoing reasons BMWED and BRS respectfully submit that the petition for exemption should be denied

Respectfully submitted,

/s/

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Dated September 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Comments of the Brotherhood of Maintenance of Way Employes Division/IBT and Brotherhood of Railroad , by first-class mail, postage prepaid, to the offices of the following

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